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No. 87-1190

In The Supreme Court Of The United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA,
PETITIONER

v.

RAY C. BROCE and
BROCE CONSTRUCTION CO., INC.
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that under the facts and circumstances of this particular case, a guilty plea does not in and of itself constitute a waiver of double jeopardy protection.

2. Whether the Court of Appeals erred in affirming the District Court's factual determination that the two indictments returned against respondents charged different aspects of the same conspiracy.

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OPINIONS BELOW

The order and judgment of the court of appeals affirming the district court's grant of relief to respondents (Pet. App. 1a-4a) is unreported. The memorandum and order of the district court granting respondents relief

(Pet. App. 5a-13a) is unreported. The prior opinion of the en banc court of appeals reversing the district court's denial of relief (Pet. App. 14a-86a) is reported at 781 F.2d 792. The prior opinion of the court of appeals panel (Pet. App. 87a-111a), which was vacated on the grant of rehearing en banc, is reported at 753 F.2d 811. The original memorandum and order of the district court denying respondents relief (Pet. App. 112a-123a) is unreported.

JURISDICTION

1. The order of the district court denying respondents' motion to vacate was entered on November 18, 1983. (Pet. App. 112a-123a)

2. The order of the court of appeals panel reversing the district court's order was entered January 9, 1985. (Pet. App. 87a-111a)

3. The order of the en banc court of appeals remanding was entered January 2, 1986. (Pet. App. 14a-86a)

4. The factual determination made by district court was entered June 30, 1986. (Pet. App. 5a-13a)

5. The order of the court of appeals panel sustaining the district court's factual determination and denying reconsideration of the court's January 2, 1986 en banc disposition was entered on August 18, 1987. (Pet. App. 1a-4a)

6. A petition for rehearing and suggestion for rehearing en banc was denied on November 13, 1987. (Pet. App. 124a-125a)

The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment provides: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

STATEMENT

Respondents Ray C. Broce and Broce Construction Co., Inc. represent a Kansas Corporation and it's owner engaged in the highway construction business with it's principal office at Dodge City, Kansas.

On November 17, 1981, a two-count indictment was returned against respondents and others charging a violation of Sec. 1 of the Sherman Act (15 U.S.C. 1) and mail fraud in violation of 18 USC 1341. ("Broce 1") (U.S. v. Broce Construction Co., Inc. et al., Criminal No. 81-20119-01 (D. Kans). Respondent Ray Broce, President of Broce Construction was identified by the Government as a co-conspirator in Broce I. (Pet. App. 143a-151a)

In Count I of Broce I Indictment, it was charged that the respondents had engaged in a combination and conspiracy to submit colusive, noncompetitive and rigged

bids on project No. 23-60-RS-1080 (9) let by the State of Kansas on April 25, 1978. In Count II it was charged that the respondents engaged in a scheme and artifice to defraud the State of Kansas and the United States by causing a warrant to be delivered by the United States mail in payment of the project referred to in Count I. (Indictment, Crim. No. 81-20119-01, Count I, Par. 11-13, Count II, Par. 3-4). (Pet. App. 143a-151a)

By a letter of January 11, 1982, petitioner notified respondents and their attorneys just before trial of the first indictment that the petitioner was going to seek an additional indictment. This was consistent with petitioner's position in all prosecutions of alleged bid rigging in the State of Kansas wherein they would notify the respondents prior to trial that in essence that if the respondents did not enter a plea of guilty then petitioner would seek another indictment on some other project. The petitioner was notified that the respondents Ray Broce and Broce Construction wished to enter a plea of guilty to the first indictment. The respondents were in the position of entering a plea of guilty or facing multiple indictments and trials. On January 27, 1982, the respondents entered into a plea agreement with petitioner. Petitioner required that respondents be convicted of two anti-trust violations carrying a potential One Million Dollar fine for respondent Broce Construction and One Hundred Thousand Dollars for respondent Ray Broce. Respondent Ray Broce plead guilty to both

Counts I and II in the first indictment and was fined and imprisoned on each count. Respondent Ray Broce also was required to plead guilty to the one count in the second indictment. Respondent Broce Construction plead guilty to the first count of the first indictment and was fined Seven Hundred Fifty Thousand Dollars. Under the terms of the plea agreement Count II of the second indictment was dismissed. This eliminated respondent Broce Construction Co. from a potential One Thousand Dollar fine. The petitioner also agreed not to prosecute respondents further in Kansas even though they could not legally do so nor prosecute them in Oklahoma where no charges had ever been filed. Petitioner further agreed to recommend a fine of One and one-half Million Dollars against the corporation on the Sherman Act charges when the maximum legal fine was One Million Dollars. (Pet. App. 127a-128a, 134a-135a)

On February 4, 1982, a second indictment was returned against respondent Broce Construction and respondent Ray Broce. It contained one count for alleged violation of the Sherman Act (15 U.S.C. Sec 1) The indictment in Broce II is identical in all respects to the indictment in Broce I except Jerry Gumm, General Manager of Broce Construction, was eliminated as a defendant; different project numbers are set out with the first indictment referring to a period beginning April 19, 1978 and continuing thereafter and the second indictment beginning on or about July 19, 1978, and con-

tinuing thereafter; a substitution of terminology where the first indictment refers to "Federal Aid Highway Project" and the second indictment refers to "Public Highway Construction Project" and a paragraph numbering change. (Pet. App. 136a-142a) The respondents and their attorney appeared for a plea on February 8, 1982. Just prior to the plea the respondents and their attorney were handed the second indictment. At that time, neither respondent was advised of their double jeopardy rights. Mr. Crockett, counsel for the respondents at that time, filed a sworn affidavit with the Court that defense counsel did not consider the issue of double jeopardy nor was the issue of double jeopardy discussed with the respondents. The record clearly demonstrates that the Court advised the respondents of numerous constitutional rights but never at any time discussed the issue of double jeopardy or advised respondents of their double jeopardy rights.

On March 15, 1982, sentence was pronounced in both Broce I and Broce II. In Broce I respondent corporation was fined Seven Hundred Fifty Thousand Dollars and the mail fraud count was dismissed. In Broce II respondent corporation was fined Seven Hundred Fifty Thousand Dollars. Respondent Ray Broce received a fine of Fifty Thousand Dollars and two years imprisonment for each anti-trust charge, the sentences to run concurrent. Respondent Ray Broce was fined the sum of One Thousand Dollars and sentenced to two

years on Count II of Broce I. The sentence of imprisonment was concurrent with the previous sentences. The total fine against respondent corporation was One and one-half Million Dollars and the total fine against respondent Ray Broce was One Hundred and one Thousand Dollars.

On February 22, 1983, respondents, pursuant to F. R. Crim. P. 35 (A) filed a motion to vacate the judgment and sentence in Broce II, claiming that the judgment and sentence in Broce II was illegal in that it violated the double jeopardy clause of the Fifth Amendment of the United States Constitution. The motion was made after a decision filed January 31, 1983, in a similar case in the State of Kansas involving other indicted corporations and defendants for bid rigging. In *United States of America v. Beachner Construction Co., Inc.*, 555 S.Supp. 1273 (D Kan. 1983) which was affirmed by the court of appeals (729 F.2nd 1278 (1984)), District Judge Saffels found after an evidentiary hearing that the conspiracy to rig bids on Kansas highway construction projects was a continuing conspiracy and that subsequent prosecutions of an acquitted corporation constituted double jeopardy. The district court denied the motion of respondents by concluding that respondents had waived their right to the double jeopardy claim and their right to challenge the sentence on that basis by pleading guilty. The district court did not ad-

dress the question of whether there was one or multiple conspiracies. (Pet. App. 112a-123a)

The court of appeals reversed in *United States v. Broce*, 753 F.2nd 811 (10th Cir. 1985) and petitioner requested a new hearing *en banc*. This Court sitting *en banc* concluded from the facts that the plea of guilty did not waive the defense of double jeopardy under the circumstances of this case. *United States v. Broce*, 781 F.2d 792, (10th Cir. 1986). The Court remanded the case for a determination on the evidence as to the existence of a single or separate conspiracy. Petitioner had previously stipulated that the record in the Beachner evidentiary hearing be used as part of the factual record. (Pet. App. 22a) In that record Judge Saffels analized the usual and common system of setting up Kansas highway jobs; the common language; the lack of precautions; the continuing obligations among contractors; the necessity of telling other contractors if everyone had agreed "to go along"; the common purpose and objective; and concluded that bid rigging was "a way of life in Kansas". (Pet. App. 22a-23a)

Guided by the common objective test in *United States v. Wilshire Oil Company of Texas*, 427 F.2d 969 (10th Cir.) *Cert. Denied*, 400 U.S. 829 (1970) the District Court held that the conspiracies charged as anti-trust violations in Broce I and Broce II were a single conspiracy and ordered the conviction in Broce II vacated as to respondents. (Pet. App. 5a-13a)

Petitioner once again appealed arguing that the District Court erred in finding that factually there was one continuing conspiracy. The government also urged the court to reconsider its en banc opinion of January 2, 1986.

The court of appeals, after considering this Court's most recent case in this area of the law, *Ricketts v. Adamson*, No. 86-6 (June 22, 1987), wrote (Pet. App. 1a-3a):

> "... Although *Ricketts* invalidates the broader rationale underlying the plurality opinion in *Broce*, that the double jeopardy prohibition "does not constitute an individual right which is subject to waiver," 781 F.2d at 795, it does not affect its narrower holding, based on clear Supreme Court precedent, that a guilty plea does not itself constitute a waiver of double jeopardy protection. *Id.* at 796-97; see also *Menna v. New York*, 423 U.S. 61, 62-63 & n.2 (1975) (guilty plea is merely an admission of factual guilt, which does not bar a claim that the state may not constitutionally prosecute the defendant no matter how validly his factual guilt is established); *Blackledge v. Perry*, 417 U.S. 21, 29-31 (1974). To the extent that the government's first argument may read as requesting reconsideration of the court's en banc disposition, we will not do so. 10th Cir. R. 35.6
>
> The government next argues that the district court's factual finding that both indictments charged a single conspiracy was clearly erroneous. We have examined the record carefully and we are satisfied that the district court's decision was not clearly errone-

ous. *cf. United States v. Beachner Construction Co.*, 729 F.2d 1278, 1281-83 (10th Cir. 1984)."

Petitioner's request for rehearing was denied and the petitioner's suggestion for rehearing en banc was also denied (Pet. App. 124a-125a)

ARGUMENT

WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT UNDER THE FACTS AND CIRCUMSTANCES OF THIS PARTICULAR CASE, A GUILTY PLEA DOES NOT IN AND OF ITSELF CONSTITUTE A WAIVER OF DOUBLE JEOPARDY PROTECTION.

Petitioner argues that respondents waived the violation of their double jeopardy rights because they entered a plea of guilty. The court specifically found that the plea of guilty was not a bar to consideration of whether the charge contained in the second indictment was void because of the double jeopardy clause of the Fifth Amendment.

Petitioner argues that respondents entered counseled pleas of guilty to both indictments and therefore waived their right for the court to consider double jeopardy. Petitioner's position was specifically rejected in *Menna v. New York*, 423 U.S. 61 (1975). The court of appeals sitting en banc previously adopted the position that the government never had the right to bring respondents into court to face the second indictment. *United States*

of America v. Broce 781 F.2d 792 (Tenth Circuit 1986)

Petitioner argues that there was a plea agreement requiring respondents to plead guilty to a second indictment and that respondents received substantial benefits. Respondent Ray Broce received no benefits as he plead guilty to all charges in the first indictment and the Anti-Trust Count in the second indictment. He was fined and sentenced to prison on each count. The mail fraud count in the first indictment against Respondent Broce Construction was dismissed. The court of appeals rejected petitioners contention that the dismissal of one count of mail fraud with a possible One Thousand Dollar fine granted substantial benefits to the respondent corporation so that the court should uphold it's illegal conviction on a anti-trust violation which carries a One Million Dollar fine. The petitioner further contends that it agreed not to prosecute respondents in the State of Kansas or Oklahoma. Since petitioner could not legally prosecute either respondents under their conspiracy theory for various projects in the State of Kansas, the petitioner failed to demonstrate to the Court where any substantial benefit was obtained by these respondents. No charges have ever existed against either of these respondents in the State of Oklahoma and there is no evidence in the record that the petitioner had either the intention or the right to instigate prosecution against these respondents in Oklahoma. The total sum benefit received by the respondents was that the respondent

corporation did not have to pay a possible maximum One Thousand Dollar fine in Count II of the first indictment. The petitioner argues that this should outweigh the fact that they could never legally bring the charge set out in the second indictment.

Petitioner argues that a guilty plea is an admission of all material facts in an indictment and that the two indictments against respondents charged separate conspiracies. Petitioner contends that the double jeopardy issue in this case was based on separate and distinct agreements to rig bids on particular projects. This position is directly contrary to petitioner's own argument that bid rigging was a way of life in the State of Kansas and specifically petitioner's evidence presented to the trial court that the contract let April 25, 1978, contained as part of conspiracy an agreement to give certain future projects to other contractors. It defies logic to adopt a position that a number of contractors conspired to award a given project to one contractor with no thought of having any effect on the letting of future projects. The argument that the face of the indictment charged different conspiracies has been analized and specifically rejected by the court of appeals panel (Pet. App. 87a-111a), reported at 781 F.2d 792. The opinion sets forth the paragraphs of the indictment in some detail and concludes that petitioner's own statement demonstrates the conspiracy involved in project number 23-60-RS-1080 (9) concerned other projects. In examining the face of

the indictments, Judge Bohanon, writing for the majority, stated "indeed, nothing in either indictment is definitely inconsistent with the view that the conspiracies they allege are in fact identical . . ." (Pet. App. 87a-111a)

Petitioner urges this Court to review this case even though the court of appeals ruled under the guidance of this Court's most recent decision in this area. After three appeals by petitioner, the court of appeals consistent with it's previous holdings, found (Pet. App. 1a-3a):

> ". . .The Supreme Court's recent decision in *Rickets v. Adamson*, 55 U.S.L.W. 4914 (U.S. June 22, 1987), made it clear that a criminal defendant may voluntarily waive his double jeopardy protection. *Id.* at 4916 ("an agreement specifying that charges may be *reinstated* given certain circumstances is . . . *precisely* equivalent to an agreement waiving a double jeopardy defense"). Although *Ricketts* invalidates the broader rationale underlying the plurality opinion in *Broce*, that the double jeopardy prohibition "does not constitute an individual right which is subject to waiver," 781 F.2d at 795, it does not affect its narrower holding, based on clear Supreme Court precedent, that a guilty plea does not itself constitute a waiver of double jeopardy protection. *Id.* at 796-97; see also *Menna v. New York*, 423 U.S. 61, 62-63 & n.2 (1975) (guilty plea is merely an admission of factual guilt, which does not bar a claim that the state may not constitutionally prosecute the defendant no matter how validly his factual guilt is established); *Blackledge v. Perry*, 417

U.S. 21, 29-31 (1974). To the extent that the government's first argument may be read as requesting reconsideration of the court's en banc disposition, we will not do so . . ."

WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S FACTUAL DETERMINATION THAT THE TWO INDICTMENTS RETURNED AGAINST RESPONDENTS CHARGED DIFFERENT ASPECTS OF THE SAME CONSPIRACY.

Petitioner for the first time argues that respondents were not entitled to a factual determination as to whether there was one or multiple conspiracies. Petitioner previously stipulated that the court "'consider the record made in the evidentiary hearing'" held in the *Beachner* case (see Pet. App. 63a). Not only did petitioner so stipulate, there was no objection raised nor any reservations placed on the stipulation. A review of petitioner's docketing statement with the court of appeals and their previously filed briefs question the results of the court's factual determination but not the right to make that determination. It appears that because petitioner is dissatisfied with the result of the factual determination it attempts to raise new an issue not heretofore presented to either the district court or the court of appeals.

The District Court without any objection from petitioner and relying on the stipulation of petitioner, utilized the "common objective" test and made the following factual findings:

1. ". . . the construction contractors active in the state during that period had a 'common objective'."
2. ". . . the separate bid riggings had been effected through a 'common method'."
3. ". . . the conspiring contractors used and understood 'common jargon'."
4. ". . . none of the [contractors] expressed any fear or concern that approaching a fellow contractor about this illegal activity would result in their being reported to the authorities."
5. ". . . the process of requesting and submitting complementary bids [created] 'mutual and interdependent obligations' . . . among contractors who participated in 'set-up' jobs."
6. ". . . [the conspiracy was continuously present and could be 'plugged into' at any time."

(Pet. App. 5a-13a)

The district court then concluded:

"Because the two indictments returned against these defendants charge simply different aspects of the same conspiracy to restrain competition, we conclude that the defendants' conviction under both indictments (even though obtained through guilty pleas) constituted a violation of their rights under the double jeopardy clause of the fifth amendment." (Pet. App. 5a-13a)

The court of appeals reviewed the district courts

findings and properly found that the district court's decision was not clearly erroneous. (Pet. App. 12-3a)

Petitioner had the burden to clearly demonstrate error in the district court's findings. Factual findings of the district court are not lightly to be set aside. Where the evidence supports a conclusion either way, the choice between two permissible views of the weight of the evidence is not "clearly erroneous." *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949). Moreover, an appellate court views a district court's findings based on sharply conflicting evidence as "conclusively binding." *Buena Vista Homes, Inc. v. United States*, 281 F.2d 476, 480 (10th Cir. 1960).

When, as here, the district court's findings are supported by substantial evidence, such findings cannot be "clearly erroneous." *Wagner Tractor, Inc. v. W. E. Shields*, 381 F.2d 441, 445 (9th Cir. 1967). Even an "adequate basis" for the findings suffices. *Sawyer v. United States*, 298 F.2d 333 (U.S. App. D.C. 1962).

CONCLUSION

Petitioner argues that the court of appeals decision in this case would "portend a nightmare for the federal courts as well as for state and federal prosecutors". This argument is meritless as this case merely requires that petitioner comply with the law and stop their attempts

at making separate and multiple conspiracies out of a single conspiracy.

The judgment of the court of appeals sitting *en banc* finding no waiver of double jeopardy under the facts in this case and the judgment of the District Court on remand from the Court of Appeals finding that " . . . the two indictments returned against these respondents charge simply different aspects of the same conspiracy to restrain competition . . . " which was affirmed by the court of appeals should stand and the petition for writ of certiorari should be denied.

Respectfully submitted,

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